In the Supreme Court of the United States.

DECEMBER TERM, A. D. 1871.

No. 178.

CHARLES R. LYNDE, Plaintiff in Error,

vs.

THE COUNTY OF WINNEBAGO, STATE OF IOWA,
Defendant in Error.

Argument for Plaintiff in Error.

Reed & Woodward, Prs., 401 7th st.

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Argument for Plaintiff in Error.

This was an action brought in the United States Circuit Court for the District of Iowa, by Charles R. Lynde, a citizen of New York, against the County of Winnebago, Iowa, to recover the sum of twenty-two thousand dollars, due upon twenty-six coupon bonds, for five hundred dollars each, issued by the defendant for the purpose of erecting a court-house in said County. The plaintiff averred, in his petition, the execution of said bonds and coupons by the defendant, his purchase of the same for value and before maturity, that he is the owner of the same, and that they are valid and subsisting claims against the County. The plaintiff set out a copy of the bonds, which are payable to Martin Bumgardner or bearer, and which recite on their face that—

"All of said bonds are issued in accordance with a vote of the people of said County, and in pursuance of an order of the County Court of Winnebago County, legally entered of record in the office of the county judge, on the 9th day of March, A. D. 1860, in fulfillment of a contract entered into with said Martin Bumgardner, for the erection of a court-house for said County of Winnebago. And the people of said county have voted the levying of sufficient taxes, from year to year, to pay the principal and interest of each and all of said bonds as the same mature and become payable."

"In witness whereof I, Robert Clark, county judge of said county, have hereto set my hand and affixed seal of the said county, the ninth day of March, A. D. 1860."

[SEAL.] ROBERT CLARK,
County Judge.

The answer of the defendant denied specifically each allegations of the plaintiff's petition. The case was, by agreement of the parties, submitted to the court without a jury. The court on the evidence made a special finding of the facts, as follows, viz:

1st. That the plaintiff owns the bonds, and received them of his father by will, and the father purchased them for value, without notice of any defence to them, before their maturity.

2d. That the county judge of Winnebago submitted to the voters of said county, at a special election, held on the 6th day of March, 1860, the question of levying a tax of seven mills on the dollar, for the purpose of building a court-house; said tax to be levied annually, not exceeding ten years, until sufficient amount was raised for said purpose, and that the whole number of votes at said election, was twenty-nine, of which twenty-four were in favor of the proposition.

3d. That no proposition was ever submitted to said voters to borrow money or to issue bonds for that or any other purpose.

4th. That the county judge made a contract with Martin Bumgardner to build a court-house for said county, and on account of said contract made and delivered to him, on the 9th day of March, 1860, bonds in the name of the said county for $20,000, the amount for which the court-house was to be built.

5th. That afterwards, Robert Clark, the judge aforesaid, went to New York, with said Bumgardner, and claiming to act as county judge of said county, made and issued to said Bumgardner new bonds for $20,000, which new bonds differed in the amount of each and in time of payment, and the amount of coupons, and other particulars, and had a seal made at New York, which he called the seal of the county, and then and there signed said bonds and affixed said seal to them, and delivered them to said Bumgardner, and that they are the same bonds on which this suit is founded.

6th. That the said Clark proposed to issue said bonds in substitution for those first mentioned, which were to be deli-

vered up and cancelled, and the evidence shows that they were delivered to the said Clark at New York.

7th. That while said Clark was in New York, making and delivering the bonds offered in this suit, the clerk of the district court of Winnebago was acting as county judge in said county, and held a term of a county court, and issued county warrants, and did other business in discharge of his duties as acting county judge: thereupon the court finds the law to be for the defendant. And the court gave judgment accordingly. (See pages 33–34, Record.)

To this ruling and judgment the plaintiff excepted.

Four errors are assigned by the plaintiff in error, viz:

1st. The Court below erred in admitting evidence tending to contradict the recitals of the bonds sued on.

2d. The court below erred in admitting evidence tending to show irregularities in the manner of the execution of said bonds.

3d. The court below erred in admitting the evidence offered by defendant tending to show under what circumcumstances the bonds were issued.

4th. The court below erred in rendering judgment for defendant.

It is believed that the evidence objected to was inadmissible, and on this point we cite Bissell *vs.* Jeffersonville, (24 Howard, 287,) Knox Co. *vs.* Aspinwall, (21 Howard 544,) Moran *vs.* Miami Co., (2 Black 722,) Gelpcke *vs.* Dubuque,) (1 Wall, 203,) Meyer *vs.* Muscatine, (1 Wall, 385.) But inasmuch as we further believe that such evidence, even if admitted, should not have the legal effect given to it by the court below in rendering judgment for defendant, we purpose to discuss this case with reference to the questions arising on the 4th assignment of error, viz:—whether the judgment is justified by the facts found by the court.

I.—*As to the questions arising on the 2d, 3d and 4th findings of the Court.*

First, whether the proposition to raise money for the purpose of building a court-house, was properly submitted to, and voted upon by, the people of Winnebago county.

Secondly, as to the power of the county judge, after such vote, to contract for the building of a court-house and issue, in payment therefor, the bonds of the county.

The consideration of these questions involves a brief discussion of the law of the State in relation to the powers of the county and the authority and duties of the county judge.

According to sec. 98, Code of Iowa, 1851,

"Each county now or hereafter organized is a body corporate for civil and political purposes only; and as such may sue and be sued; shall keep a seal such as provided by law; may acquire and hold property and make all contracts necessary or expedient for the management, control, and improvement of the same, and for the better exercise of its civil and political powers, may take any order for the disposition of its property; and may do such other acts, and exercise such other powers, as may be allowed by law."

By sec. 106, Code of 1851, the county judge is made—

"The accounting officer, and general agent of the county, and as such is authorized and required," (among other things,) "to take the management of all county business;" "to audit all claims for money against the the county; to draw and seal with the county seal all warrants on the treasurer for money to be paid out of the county treasury;" "to superintend the fiscal concerns of the county, and secure their management in the best manner."

By sec. 129, Code 1851, the county judge as a county court has power—

"To provide for the erection and reparation of court-houses, jails, and other necessary buildings within and for the use of the county."

In construction of the legal authority of the county judge we cite Ring *vs.* The County of Johnson, (6 Iowa, 265,) which was an action on certain coupons issued in connection with bonds, for subscription to stock of Lyons Iowa Central R. R. Co. These coupons were not signed by the county judge, but by the "Clerk of the County of Johnson, *by order* of the Judge of the county court;" nor was the county seal affixed. The defence was that the *County* had no power to enter into such contract; that the plaintiff had not alleged

such power, and that the coupons were not under the seal of the County nor executed by it.

The Supreme Court of the State said, page 272—

"In the case of Clapp *vs.* The County of Cedar, (5 Iowa, 15,) we have expressed the idea that although the statute constitutes the county judge 'the general agent' of the county, yet the law of principal and agent and the common idea of an agency, do not apply to him, nor to the relation existing between him and the County; because he is an office created by the law, his powers and duties are defined by the law, and not by the county, and he is answerable to the law; and although the people of a county elect the person who shall act, yet they do not create the office, nor define his powers and duties, and they cannot refuse to elect, nor can they dismiss him. So that he is the living representative, the embodiment of the county. His acts are the acts of the corporation."

The court held that the "power to make these contracts existed by virtue of the general law of the land," and the action on these coupons was sustained.

In the case of the State of Iowa *ex. rel.* Brooks *vs.* Napier Co. judge, (7 Iowa 425,) which involved simply the question whether mandamus would lie to compel the county judge to submit to the vote of the qualified electors of the county, (Polk,) the question "whether the county judge shall conclude a certain contract for the building of a court-house for said county, the court said:

"The county judge may enter into contracts for the erection of such buildings, binding the county thereby, without first submitting to a vote of the people of the county the question of their adoption, or the propriety of incurring the expenditure of money necessarily involved in them. * * * The county may be in debt and its warrants depreciated; the court-house proposed to be built, as to the plan and cost of the same, may be altogether unsuited to the wants and to the means of the county; and yet if the county judge chooses to contract for its erection, so far as we are able to discover, there is no limit to his discretion, and no means in the hands of the people to defeat it."

Held that mandamus would not lie.

It is true that since the issuing of the bonds sued on in this case, and since the general power of the counties to issue

negotiable bonds for such purpose as that under consideration had been settled by decisions of this court, the Supreme Court of Iowa have held, (Hull & Argalls *vs.* Co. of Marshall, 12 Iowa, 142,) that while the county judge may lawfully impose an indebtedness upon the county, by a contract for the building of a court-house, without a vote of the people, he cannot issue bonds in payment of such indebtedness without submission of the question to the qualified electors. But it is to be observed, in relation to that case, that the whole drift of the reasoning of the court in reaching that conclusion seems to be, that the question must be submitted to the people, *because, otherwise*, there would be no special fund set apart for the payment of the bonds by a special tax, voted and levied in the manner contemplated by law; that while ordinary indebtedness might be discharged by warrants drawn on the treasurer by the county judge, bonds, if issued, could only be paid from the fund set apart and specifically appropriated for that purpose, and that no vote to incur extraordinary indebtedness would amount to anything, unless a special tax were laid for the payment thereof. The vote to lay a special tax appears to be the substantial and essential part of the proceeding.

In the case now before this court, a proposition was submitted to the people. It is true that the finding of the court shows that in words it did not mention either the borrowing of money or the issuing of bonds. But we submit that it was not necessary to specially mention either. To our mind the proposition submitted certainly *involved* the incurring of a debt; and the vote of the people having provided a special fund by special tax for the payment of such debt, the bonds, being but the evidences thereof, might lawfully be issued as an incident thereto. And we think this view is sustained by secs. 115, 116, of the Code of '51, in relation to this subject.

We maintain this construction because the statutes do not prescribe any precise form of words in which the proposition shall be submitted, "when a question so submitted *involves* the borrowing of money *or* the expenditure of money, &c.;"

and in sec. 119, it is provided that "the county judge on being satisfied that the above requirements have been *substantially complied with* and that a majority of the votes cast are in favor of the proposition submitted, shall cause the proposition and the results of the vote to be entered, &c."

From the above sections of the Code, and cases cited, we deduce the following conclusions:

First. That the county of Winnebago, being a body corporate under the laws of Iowa, for civil and political purposes, having power expressly conferred by statute "to acquire and hold property, and make all contracts necessary or expedient for the management, control, and improvement of the same," had indisputable power to issue these bonds, in providing for the erection of a court-house.—Clapp *vs.* The County of Cedar, 5 Iowa, 15; Ring *vs.* Johnson Co., 6 Iowa, 265; McMillen *et. al. vs.* Lee County, 6 Iowa, 392 Code of '51, sec. 93.

Second. That the county judge had sole and absolute authority to make a contract for the erection of a court-house, binding the county thereby, without first submitting to the vote of the people the question of its adoption or the propriety of incurring the expenditure necessarily involved.—(Code of '51, secs. 106,–125,) (State of Iowa, *ex. rel.* Brooks *vs.* Napier Co. J., 7 Iowa, 425.)

Third. That if in providing for the erection of a court-house it becomes *necessary* or *expedient* to issue the bonds of the county in payment therefor, the county judge, as the "hand and head of the county," "the living representative and embodiment of the county," is the proper and authorized officer to issue the same and affix the seal of the county thereto, his acts being the acts of the corporation in that respect.—Code of '51 secs. 104, 106, 108, Ring *vs*, Johnson, 6 Iowa, 272; Clapp *vs.* Cedar Co., 5 Iowa, 15.

Fourth. That if the assent of the qualified voters of the county has been given to the borrowing of money for such purpose, by their voting a special tax providing a fund for the payment of such indebtedness, the county judge, by such

authority, combined with his general power, may properly and as a necessary incident, issue the bonds of the county therefor.—Code of '51, secs. 119, 165, 166.

II.—*As to the questions arising on the 5th and 6th findings of the Court.*

These findings establish the following facts:

That the county judge of Winnebago County went to the city of New York and there had these bonds printed and executed, and there delivered the same to the person who had contracted to build the court-house.

That said county judge had a new seal made at New York, which seal he there caused to be affixed to said bonds as the seal of said county.

That said bonds were issued in substitution for certain other bonds originally issued, which original bonds were to be delivered up and cancelled.

So far as we are able to discover none of these several proceedings are prohibited, or were at the time of this performance, by any express enactment of the State Legislature. Nor can we learn that any Statute of Iowa forbids the county judge to leave his county during his term of office; nor is it anywhere provided that he shall cease to be county judge if he does temporarily go beyond its limits: nor is he forbidden to transact any business on behalf of the county outside of the county, nor to affix the county seal to any written evidence of a contract, on behalf of the county, outside its limits. If these several acts are illegal, therefore, they are so, not because prohibited by statute, but upon general principles of law.

Of these acts in their order; and first—

As to the county judge having gone to New York, and there having had performed the mechanical operation of the printing, and there signing and delivering these bonds, which were payable in New York, and which were to be put on the market and sold in New York. It is the usual course to make bonds issued by counties in the Western States

payable in New York or some other financial centre. This does not render them invalid. They are issued for the very purpose of going outside the county to raise the money necessary for improvements in the county, If the bonds may be made payable in New York, and may be delivered and sold there, why may they not be printed and signed there? All the essential proceedings in this case had been performed in the county. The vote of the people had been taken there, the contract made there, the whole transaction complete, save the execution and delivery of the written evidences of indebtedness. Might not then the properly authorized financial officer of the county execute the bonds in New York?

In the case of Meyer *vs.* Muscatine, (1 Wallace, 385,) one of the defences set up against bonds of the city was that they were made payable at New York and not at the city treasury of Muscatine. In deciding that point the court uses language which we think applicable to this case.

"It was according to the general usage to make such bonds and coupons payable in the city of New York. It added to the value of the bonds, and was beneficial to all parties. No legal principle forbids it. The power of a municipal corporation to make any contract does not depend upon the place of performance, but upon its scope and object. A city authorized to establish gas works and water works, and to gravel its streets, may buy water, coal, and gravel beyond its limits and agree to pay where they are found or elsewhere. The principal power, when expressed, draws to it by necessary implication, the means of its execution. This is a settled rule in the construction of all grants of authority, whether to governments or individuals. If the subject admitted of doubt, we should hold that the city having acted upon its own construction and drawn in others to take the securities and advance their money upon it, is now concluded from denying that construction to be the true one."

Next as to the county judge having had a new seal made at New York and there having affixed the same, as the seal of the county, to these bonds. In the first place, the *procuring* of this new seal was no irregularity, because it was just what was expressly enjoined by sec. 94, Code of '51.

"The county judge of each county having a seal is required to obtain, as soon as practicable, for his county, a new seal of the same size with the present one, and with the same device; but the inscription on which shall be "seal of the county of —— Iowa, (naming the county,) in capital letters; and each new seal hereafter obtained, shall be of the same description, &c."

Neither this nor any other statute directs where the county judge shall have the new seal made. He is not prohibited from having it made in New York City. That is left to the discretion of the county judge, he being the "representative of the county," and "the keeper of the county seal." The only limit imposed to his discretion in this regard is that "*each new seal hereafter obtained* shall be of the same description, &c."

As to any *other seal* than the one thus obtained by the county judge in accordance with law, we have nothing to do in this part of our argument. It is true that it was provided by the above sec. 94 that "the *seals* of the Board of Commissioners and of the Probate Court should remain until the new one was *obtained*." But we maintain that the new seal having been obtained, and affixed by the county judge to these bonds *as* the seal of the county, it *was*, as far as these bonds are concerned, the seal of the county. The objection that this was not the county seal, is like the objection that Robert Clark was not the county judge. Not the county judge—not because he had not been lawfully elected, nor because his term of office had expired, nor because he had been legally deposed, *but only so far as this act* was concerned, and *because* it was performed in New York. And this seal was not the county seal, not because it had not been duly obtained and made the seal of the county by the officer authorized by statute, *but because it was affixed to these bonds*, and the act was performed in New York. The question then is, could the county judge perform a valid official act outside his county? As to this we do not claim that he might hold a term of his county court in New York, nor perform his *judicial* duties there. We simply maintain that he might

lawfully perform there acts and duties devolving upon him as the financial manager of county affairs. Sec. 126, (Code of '51,) expressly recognizes that he may be "required by law to perform some duty which takes him from his county."

In the case of the Galveston R. R. Co. *vs.* Cowdrey, (11 Wall, 439,) where one defence set up against certain bonds of a R. R. Corporation was that the mortgage given to secure the same, was executed out of *the State*, by virtue of a resolution of Directors, passed at a meeting held out of the State, this Court said:

"It is generally true that a corporation exists only within the territory of the jurisdiction that created it. But it is well settled that a corporation may, by its agents, make contracts and transact business in another territory, and may sue and be sued therein. It may hold land in another territory, so long as the local authorities do not object. And we see no reason why it should not be stopped by the action of its Directors in another territory, when that action is the basis of negotiations by which third parties have, *bona fide*, parted with their money, and the company has received the benefit of the transaction. A contrary doctrine would authorize a company to take advantage of its own wrong, and would seriously impair the negotiability and value of such securities. Must a person purchasing Railroad bonds in Wall street or Walnut street first send to Illinois, California, or Texas to see whether the meeting of the Directors which authorized the mortgage given to secure the bonds was held in a proper place? Whoever may, under any supposable circumstances, raise an objection of this kind, it ought not to lie in the mouth of the company to raise it."

As to the fact that the bonds sued upon in this case were issued by the county judge in substitution for the bonds originally prepared, and that they differred from the original ones in certain particulars specified, we respectfully submit that if the county judge had authority to issue bonds in the first instance, he certainly had power, before these bonds had been put on the market, or gone into circulation, to cancel them and substitute others in their place.

III.—*As to the questions arising on the 7th finding of the Court.*

The only question presented here, it seems to us, is whether because the county clerk was acting as county judge in the county, holding a term of court, &c., at the time the county judge was absent in New York, the latter ceased to be county judge and therefore these bonds are invalid. And the answer, in our opinion is that while the county judge was lawfully absent from the county, transacting financial business in behalf of the county, the county clerk might lawfully be acting in the place of the county judge as to business in the county. We do not maintain that there could be two county judges at the same time, but that one might be county judge for one purpose, and the other might be *acting* county judge in his absence. We do not say that one could hold a term of the county court outside of the county, while the other held the court within the county We do not claim that the county judge could hold a term of court in New York in any case. But we do hold that while the county judge was legally transacting business, not as a county court, but as financial and general agent of the county, in New York, it was not only not irregular, but entirely proper that the clerk should be acting county judge as described. We think that sec. 111, (Code of '51,) which provides that in case of the absence of the county judge the coutny clerk shall fill the place of the judge, fully sustains this view. And that it is further supported by the opinion of the Supreme Court of Iowa, in the case of Campbell *vs.* the County of Polk, 3 Iowa, 420, where the court "consider the county judge as possessed of two distinct characters, the one as the general agent of the county, and the other as a judge." They say further: "It is true that the character and duties may often intermingle; and it is true that the county court is to be considered in law as always open. But there are cases in which we cannot consider him as acting in a judicial capacity, but must view him as an agent, as one appointed to attend to the interests of the county and to do its business; cases in which he is merely a business man." "The auditing a claim is a judicial act in so far as an appeal lies, but drawing a warrant is ministerial."

We have thus far considered, or attempted to consider every matter of fact found as to the issue of these bonds, and the law arising thereon, commencing with the fundamental basis of inquiry, the power of the county, under any circumstances, to make contracts of this kind, and endeavoring to show that down to the time when these bonds were put on the market and sold in New York, there were no circumstances connected with their issue sufficient to render them void; and that if there were defects in the several proceedings, they amounted, in any view of the case, to no more than irregularities in the exercise of powers fully and legally vested in the County of Winnebago.

IV.— *As to the questions arizing on the first finding of the Court, viz:*

That "the plaintiff owns the bonds and received them of his father by will, and the father purchased them for value, without notice of any defence to them before their maturity."

Upon this finding we maintain as follows:

First. These bonds, although issued by a corporation, and under seal, being payable to bearer, and passing by delivery, are negotiable securities, and the *bona fide* purchaser of them, for value, before maturity, is entitled to the protection which the commercial law throws around such holder of negotiable instruments—Mercer Co. *vs.* Hacket, (1 Wallace, 83;) Gelpecke *vs.* Dubuque, (1 Wall, 175;) Thompson *vs.* Lee Co., (3 Wall, 327;) Murray *vs.* Lardner, (2 Wall, 110;) Moran *et. al. vs.* Miami, (2 Black, 722.)

With regard to the nature and extent of the protection which the law extends to the *bona fide* holder of such securities, we quote the following from the case of Farmers' and Mechanics' Bank, of Kent Co., Md., *vs.* The Butchers' and Drovers' Bank, 16 N. Y. Rep., 128. This was an action on five checks, drawn upon defendant's bank, and certified defendant's paying teller; the defence relied upon was want of power in defendant's bank to bind itself by the contract sought to be enforced; and secondly, that defendant's paying

teller had no authority to bind the bank by certifying the checks. The court held that the contract sought to be enforced *was* beyond the power of defendant, and could not be enforced against the bank by any person cognizant of the facts," and then said:

"But it by no means follows, when the unauthorized contract is in the form of a negotiable instrument, that the bank can avail itself of this defence, as against one who, without notice, has become the holder of the paper for value. This question appears to have arisen in the case of Strong *vs.* The The American Life Insurance Co., 11 Paige, 635, and the decision of the court upon this point is thus stated by the reporter: 'A negotiable security of a corporation, which, upon its face appears to have been duly issued by such corporation and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in fact issued for a purpose and at a place not authorized by the charter of the corporation, and in violation of the laws of the State where it was actually issued."

The court affirmed this doctrine and applied it to the case before them. The action on the checks was sustained.

The proposition above quoted from the 11 Paige, 635, was repeated in the same terms by this court in the case of Supervisors *vs.* Schenck, (5 Wallace, 772,) and declared to be *settled law.* In that case an action had been brought on certain bonds issued by Marshall Co., Illinois, in payment of subscription to railroad stock, pursuant to an election held February 28th, 1853, by order of the *county court*; and the defence was that two years before the election was held a statute had transferred the power from the county court to the board of supervisors, and hence that the county court had acted without legal authority, and that the bonds were absolutely void and could not be ratified. This court held that the bonds had been ratified by the subsequent action of the board of supervisors, and that the objection that the order for the election emanated from the wrong source, was no defence against a *bona fide* holder.

Second. The power of the county, under any circum-

stances, to issue negotiable bonds being shown, and these bonds being in all respects such as the county had power to issue, the *bona fide* purchaser had a right to presume they were issued under the circumstances which give the requisite validity.

In the case of the Commissioners of Knox Co. *vs.* Aspinwall, (21 Howard, 369,) which was an action on bonds issued by said Commissioners in payment of a subscription to stock of a railroad company, the defence was that the Commissioners were only authorized, by the act of the Legislature, to subscribe to stock and issue bonds, after a majority of the people of the county had so voted, at an election which was to be held, after notice, in a manner prescribed in the act; and that since such notice had not been given, the authority to issue the bonds had never vested in them.

This court said:

"The bonds on their face import a compliance with the law under which they were issued. 'This bond,' we quote, 'is issued in part payment of a subscription of $200,000, by the said Knox Co., to the capital stock, &c., by order of the Board of Commissioners, in pursuance of the third section of Act, &c., passed by the general assembly of the State of Indiana, and approved 10th July, 1849.'

"The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power. This principle was recently applied in a case in the Court of Exchequer, in England, (6 Ellis & Blackburne, p. 327, The Royal British Bank *vs.* Tarquand.) It was an action upon a bond against the defendant as manager of a joint stock company. The defence was a want of power under the deed of settlement or charter to give the bond. One of the clauses in the charter provided that the directors might borrow money on bonds in such sums as should, from time to time, by a general resolution of the company, be authorized to be borrowed, The resolution passed was considered defective. Jarvis Ch. B. in delivering the opinion of the court observed: 'We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement, but they are not bound to do more. And the party here, on reading the

deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done.' (See also 5 Ellis & Blackburne, 245, S. C., and 25 E. L. & Eq., p. 114 Made *vs.* Sutherland.) The principle we think sound, and is entirely applicable to the question before us."

In the case of Gelpcke *vs.* The City of Dubuque, (1 Wallace, 175,) the main questions before the court were as to the validity of certain acts of the Iowa Legislature authorizing municipal corporations to subscribe to railroads extending beyond the limits of the city or county, and to issue bonds accordingly, as affected by decisions of the Supreme Court of the State prior to the case of the State of Iowa *ex. rel. vs.* The County of Wapello, (13 Iowa, 288,) affirming their validity; and by the latter and subsequent decisions of the same court denying the right of the Legislature to pass such Acts. But on the point we are now considering, this court, after remarking that "the whole case resolves itself into a question of the power of the city to issue bonds for the purpose stated," and quoting from the Act incorporating the city, approved February 24th, 1847, the following:

"SEC. 27. That whenever, in the opinion of the city council, it is expedient to borrow money for any public purpose, the question shall be submitted to the citizens of Dubuque, the nature and object of the loan shall be stated, and a day fixed for the electors of said city to express their wishes; the like notice shall be given as in cases of election, and the loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative;" and quoting also the Act of the State Legislature authorizing the subscription in the particular instance, said: "By these enactments, if they are valid, ample authority was given to the city to issue the bonds in question. The city acted upon this authority. The qualifications *coupled with* the *grant of power* contained in the 27th section of the Act of Incorporation are not now in question. *If they were the result would*

be the same. When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." (See cases cited.)

In the case of Meyer *vs.* The City of Muscatine, (1 Wallace, 385,) one of the defences set up against certain bonds issued by defendant in aid of a railroad company, was that the bonds could only be legally issued after a vote of the people, taken in a manner prescribed in the charter of the city, and that, the vote not having been taken in the form required by law, the bonds were void, even in the hands of a *bona fide* holder.

The Supreme Court said:

"The record shows that all the votes cast, except five, were in favor of the loan. The city and citizens adopted and acted upon the ordinance as valid and sufficient. The citizens voted, and the city authorities issued the bonds. No one interposed to prevent their issue. It is not questioned that all the parties acted in good faith, and the city cannot now be heard to object to the regularity of its own proceedings. A party taking the bonds was bound to look to the legal authority under which the public agents acted. If that were sufficiently comprehensive, he had a right to presume that those empowered to act and acting under it had complied with its requirements.

In the case of Mercer Co. *vs.* Hacket, (1 Wallace, 83,) the Legislature of Pennsylvania, by an Act of Assembly, (1852,) had authorized the Commissioners of Mercer Co to subscribe to the stock of the Pittsburg and Erie railroad, "Provided that the subscription shall be made subject to the following restrictions, limitations, and conditions, and in no other manner or way whatsoever, viz: All such subscriptions shall be made by the County Commissioners, and shall be made by them after, and not before, the amount of such subscription shall have been designated, advised and recommended by a grand jury of said county; and such bonds shall in no case, or under any pretence, be sold, assigned, or transferred by the said railroad company a less than the par value thereof."

The bonds having been issued by the Commissioners, and reciting on their face a compliance with the above Act, in an action upon said bonds by a *bona fide* holder, the defence was that the above requirements of law had not been complied with, and that, therefore, the power to issue the bonds had never vested in the Commissioners, and the bonds being issued without legal authority, were absolutely void in the hands of any holder.

The Court said: "The bonds declare on their face that the faith, credit, and property of the county is solemnly pledged, under the authority of certain acts of Assembly, and that in pursuance of said act the bonds were signed by the commissioners of the county. They are on their face complete and perfect, exhibiting no defects in form or substance, and the evidence offered is to show the recitals on the bonds are not true; not that no law exist to authorize their issue, but that the bonds were not made 'in pursuance of the acts of Assembly' authorizing them.

"We have decided, in the case of Commissioners of Knox County *vs.* Aspinwall, that where the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further. The decision of the board of commissioners may not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of other parties had attached; but after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question.

Third. These bonds being regular on their face, and importing a compliance with the law under which they were issued, the county is estopped, in an action upon said bonds by a *bona fide* holder for value, to deny the recitals on the bonds.

In the case of Moran *et al vs.* The Commissioners of Miami County, 2 Black., 722, the defendants denied the legal validity of the bonds sued on by reason of irregularities in the negotiations and proceedings for the issue of the same. And this court held that inasmuch as the bonds declared they were issued by order or resolution pursuant to the statute

which authorized the county to issue them, "the *bona fide* holder of the bonds, whether so by endorsement or delivery, had a right to infer that the bonds had been lawfully issued, by which the County of Miami is estopped in a suit for the recovery of the interest from denying by plea that its bonds had been issued to the Peru & Ind. R.R. Co. for a loan of money to the County of Miami. We think and adjudge that the recitals in the bonds are conclusive, constituting an estoppel in pais upon the defendants in this suit." See cases cited. Also Rogers *vs.* Burlington, (3 Wallace, 654,) Cincinnati City *vs.* Morgan, (3 Wall, 275,) Bissell *vs.* Jeffersonville, (24 Howard, 287.)

The case of Marsh *vs.* Fulton Co., (10 Wallace, 674,) is cited as an authority against the plaintiff in error in this case. But we do not think it inconsistent with the positions assumed in this argument, for the following reasons: *First.* Because in the case of Marsh *vs.* Fulton Co., the county had no general power to issue the bonds, and was only authorized to do so by a special act of the State Legislature which required a vote of the people, and that the notices of election should specify the company in which stock was proposed to be subscribed, aud the vote having been taken as to one railroad company, this subscription was made and these bonds issued to another railroad, not voted upon. *Second.* Because the board of supervisors of the county alone were authorized to make, or cause to be made, the subscription and issue the bonds, and said board of supervisors having ordered their clerk to enter subscription to one railroad company, which subscription had been authorized by a vote of the people, afterwards the clerk of the county court, *acting* as clerk of the board of supervisors, made the subscription and issued these bonds to *another railroad*, onhis own responsibility, not having been authorized thereto either by order of the board of supervisors, or by vote of the people. *Third.* Because these bonds were issued and signed by the clerk of the county court of Fulton County, who had no *general authority* to bind the county by making subscription or issuing bonds, and who had not been authorized to make the subscription and issue the bonds in this particular instance.

We think this very different from a case like the present, where the power of the county to issue the bonds existed by virtue of the general law of the land, and where the bonds were issued, signed, and sealed by the county judge, whose "acts are the acts of the corporation."

Nor do we consider the case of Smith *vs.* the County of Sac, (11 Wallace, 139,) an authority opposed to the plaintiff in this case, but the reverse. In that case this court decided against the holder of the bonds, not because the bonds were executed out of the county, nor because of fraud in the county judge and contractor, but because the plaintiff had not shown himself to be a *bona fide* holder for value. The court did not hold that the irregularities connected with the proceedings in that case, nor even the circumstances remarked upon in the opinion as indicating fraud, rendered the bonds void absolutely, in the hands of *any* holder, but only adjudged that these circumstances were sufficient to call upon the plaintiff to proye that he was a *bona fide* holder for value, and he not having done so, judgment was given against him.

It was the duty of the buyer of these securities in the market of New York, seeing that they purported to be issued by the County of Winnebago, Iowa, for the purpose of erecting a court-house for said county, to inquire, first, whether the county had power to issue bonds for such purpose; secondly, whether the county judge, having received the assent thereto of the qualified voters of the county, was authorized to exercise this power; thirdly, whether the person who had signed, sealed and delivered these bonds was the county judge at the time of their issue. These questions being answered, as they must be, in the affirmative, and the bonds themselves reciting that they were "issued in accordance with a vote of the people of said county, and in pursuance of an order of the county court of Winnebago County, legally entered of record in the office of the county judge," the *bona fide* purchaser had a right to infer that the vote had been taken and the record made as declared on the face of the bonds; and the county is estopped in an action by such innocent holder to deny that the recitals on the bonds are true.

The objection that the person executing these bonds was not the county judge was never raised until the county had concluded to repudiate their payment. And then the objection is only raised so far as necessary for the purpose of repudiation. It is not denied that Robert Clark was county judge to all intents and purposes, except merely so far as these bonds are concerned. For all other purposes he was county judge, both before and after the issuing of these bonds, but for the purpose of repudiating them it is now claimed that he was not county judge.

So as to the vote of the people. The county judge was permitted to contract for building a court-house, to take the vote of the people in a manner which he deemed sufficient and regular, and to issue the bonds of the county in pursuance thereof. No one interposed to prevent him. But after the obligations of the county had gone into circulation, had become due, and payment of the same had been demanded by a *bona fide* holder, then it was discovered that the proposition had not been regularly submitted to the people. It was not until innocent purchasers had been drawn in to invest their money that the securities were found to be invalid.

The Supreme Court of the United States, by an unbroken chain of decisions, has solemnly adjudged that repudiation, under these circumstances, could not be countenanced by this this court. Intimating, in many cases, that by direct proceeding instituted, the power to issue the bonds might have been called into question, and their issue prevented, they have steadfastly declared that after the bonds had gone into the hands of innocent holders for value, it was too late to enpuire into the regularity of preceding acts. That we are not alone in this interpretations of the decisions referred to will be seen by the following extract from note on page 746 of Smith's Leading Cases, vol. 1, where the learned editor says: "Nothing, indeed, could be more resolute than the stand that has been taken by the Supreme Court of the United States in the whole matter, which, apparently, is considered one that touched the honor of the country as much as the rights of creditors."

In submitting this case to the consideration of the court, with a prayer that the judgment of the court below be reversed, and a judgment on the facts found entered for the plaintiff, we feel that we ask no more than justice and equity demand. We believe the plaintiff in this whole matter has been guilty of no negligence which should entail upon him the forfeiture of his money, *bona fide* invested in these securities. And in this argument we have advanced to sustain this view, we believe that we stand upon the firm foundation of adjudged cases, no less than upon the principles of fair and honorable commercial dealings.

D. N. COOLEY,
H. D. BEAM,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES,

NO. 382.

CHARLES R. LYNDE, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF WINNEBAGO, STATE OF IOWA.

In Error to the Circuit Court of the United States for the District of Iowa.

BRIEF OF PLAINTIFF IN ERROR.

SHIRAS, VAN DUZEE & HENDERSON,
COOLEY & EIGHMEY,
W. PENN CLARK,
Attorneys for Plaintiff.

WITHROW & WRIGHT,
Attorneys for Defendant.

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W. PENN CLARK,
Attorneys for Plaintiff.

WITHROW & WRIGHT,
Attorneys for Defendant.

ASSIGNMENT OF ERRORS.

The plaintiff in error says there is manifest error on the face of the record in this :

1st. The Court below erred in admitting evidence tending to contradict the recitals of the bonds sued on.

2d. The Court below erred in admitting evidence tending to show irregularities in the manner of the execution of said bonds.

3d. The Court below erred in admitting the evidence offered by defendant tending to show under what circumstances the bonds were issued.

4th. The Court below erred in rendering judgment for defendant.

SHIRAS VAN DUZEE & HENDERSON,
COOLEY & EIGHMEY, and
W. PENN CLARK.
Attorneys for Plaintiff in Error.

ABSTRACT OF THE CASE.

Plantiff in error, Charles R. Lynde, a citizen of New York claims to recover of defendant, the County of Winnebago, State of Iowa, the sum of twenty-two thousand dollars, as money due upon twenty-six several coupon bonds, for the sum of five hundred dollars each, issued by defendant, all dated March 9th, 1860, payable to Martin Bumgardner or bearer, on the 1st day of April, 1868.

The defendant filed an amended answer (see page 5 of transcript,) denying all liability on said bonds, and setting forth at great length, a statement of the alleged facts and circumstances relied upon by defendant to show that the bonds were illegally

issued, and not valid and binding upon the defendant corporation.

The case being at issue (no reply to the answer being allowed under the code practice of Iowa,) it was heard by the Court, without a jury, and a special finding of facts was made by the court, and upon these facts as found, the court found the law to be with defendant, and adjudged accordingly.

Plaintiff filed a motion for new trial, which was over-ruled, and plaintiff sued out a writ of error.

The following is the bill of exceptions signed and filed in the cause :

CHARLES R. LYNDE }
vs.
COUNTY OF WINNEBAGO, STATE OF IOWA. }

Be it remembered that, on this day this cause coming up for hearing and the parties appearing by their counsel, and it being stipulated in writing that the cause might be submitted to the court without the intervention of a jury, the court to find specially on the facts. Thereupon to maintain the issues on his behalf, plaintiff offered in evidence twenty-six several coupon bonds being the bonds declared upon in plaintiff's petition, each dated March 9th, 1860, for the sum of $500 each, and each of the form following, differing only in number :

STATE OF IOWA, UNITED STATES OF AMERICA,
County of Winnebago :

The County of Winnebago, in the State of Iowa, hereby promises to pay to Martin Bumgardner or bearer, the sum of five hundred dollars on the first day of April, A. D. 1868, with interest annually at the rate of ten per cent., according to the interest warrants hereto attached and forming a part of this contract, principal and interest payable at the American Exchange Bank, in the city of New York. And it is expressly stipulated that any failure on the part of said county of Winnebago to pay the interest promptly as specified in the coupons hereto appended or any part of the bonds issued herewith, shall cause the principal of said bonds to fall immediately due and payable.

This obligation is one of a series of forty bonds of like tenor and date, being numbered consecutively from 1 to 40, inclusive, and

amounting in the aggregate to twenty thousand dollars. All of said bonds are issued in accordance with a vote of the people of said county, and in pursuance of an order of the county co[illegible] of Winnebago County, legally entered of record in the office of the county judge on the 9th day of March, A. D. 1860, in fulfilment of a contract entered into with said Martin Bumgardner for the erection of a court house for said county of Winnebago.

And the people of said county have voted the levying of sufficient taxes from year to year to pay the principal and interest of each and all of said bonds as the same mature and become payable.

In witness whereof I, Robert Clark, county judge of said county have hereto set my hand, and affixed seal of the said county, the ninth day of March, A. D., 1860.

[SEAL.] ROBERT CLARK.
County Judge.

Attached to the bonds are eight coupons of the following form: one coming due on the first day of April in each year, commencing with 1861 and ending 1868, inclusive.

$50]

The County of Winnebago, State of Iowa, will pay fifty dollars, being interest of the within bond, No. 2, on the first day of April, 1861, at the American Exchange Bank, in the city of New York.

ROBERT CLARK.
County Judge.

Pl'ff then introduced evidence tending to show that pl'ff was a bona fide holder for value of said bonds.

Be it further remembered that thereupon, def't, to maintain the issues on its behalf, offered testimony tending to show that no proposition was ever submitted to the people of Winnebago County, Iowa, for the borrowing of money to aid in the erection of a court-house, or for the erection of a court-house therein. That the only proposition submitted to a vote of the people of that county was, whether a tax should be levied from year to year, not exceeding ten years at farthest, the proceeds to be used in paying for a court-house. That Robert Clark, the county judge of Winnebago county, Iowa, entered into a contract with Martin

Bumgardner for the erection of a court-house for the sum of $20,000, and that the county judge issued bonds to that amount and delivered them to the contractor as payment in advance therefor, and with him went to the city of New York, and about the 23d of March, 1860 the said Robert Clark, finding that the original bonds could not be negotiated, had forty other bonds, each for sum of $500.00, printed, signed the same, purchased a seal and attached the same to the bonds, and delivered the same to Martin Bumgardner, and the same were sold to pl'ff's father for $10,000 stock of the New York Central R. R.; that the old bonds were delivered up to Robert Clark and canceled; that the seal obtained in New York was brought back to Winnebago county and was by Bumgardner sold to the county for $4.00 and has ever since been used as the seal of said county; that during Clark's absence in New York, the clerk of the district court acted as county judge, and held the April term of the county court, and that one warrant was issued by such clerk, acting as county judge, during Clark's absence in New York, and that he transacted other business.

Be it further remembered, that the pl'ff, at the time said testimony was offered, objected to the same being received, and objected to each and every part of the same for the reasons:

1st. That the evidence offered is irrelevent and immaterial to the issues, and does not tend to show any facts constituting a defense to plaintiff's action.

2nd. That the evidence offered tended to contradict the recitals of the bonds, and that def't was estopped from contradicting in any manner the recitals in the bonds.

3d. That the testimony offered only tended to show irregularities in the manner of the execution of the bonds, and did not touch the question of the power to issue the same, and irregularities in the execution thereof could not be shown to defeat pl'ff's action.

The court overruled these objections, and each of them, and admitted said testimony to which ruling, pl'ff at the time duly excepted.

And, thereupon, both parties rested their case; and, after hearing the arguments of counsel, the court found the facts specially in writing, as follows:

CHARLES R. LYNDE } No. 312. Law.
vs.
WINNEBAGO COUNTY. }

This cause being submitted to the court without a jury, the court finds the following facts:

1st. The plaintiff owns the bonds, and received them of his father by will, and the father purchased them for value without notice of any defense to them, before their maturity.

2d. That the county judge of Winnebago submitted to the voters of said county, at a special election, held on the 6th day of March, 1860, the question of levying a tax of seven mills on the dollar, for the purpose of building a court-house; said tax to be levied annually, not exceeding ten years, until sufficient amount was raised for said purpose, and that the whole number of votes at said election, was twenty-nine, of which twenty-four were in favor of the proposition.

3d. That no proposition was ever submitted to said voters to borrow money or issue bonds for that or any other purpose.

4th. That the county judge made a contract with Martin Bumgardner to build a court-house for said county, and on account of said contract made and delivered to him, on the 9th day of March, 1860, bonds in the name of the county for $20,000, the amount for which the court-house was to be built.

5th. That afterwards, Robert Clarke, the county judge aforesaid went to New York with said Bumgardner, and, claiming to act as county judge of said county, made and issued to said Bumgardner new bonds for $20,000, which new bonds differed in the amount of each and in time of payment, and the amount of coupons and other particulars, and had a seal made at New York, which he called the seal of the county, and then and there signed said bonds and affixed said seal to them, and delivered them to said Bumgardner, and that they are the same bonds on which this suit is founded.

6th. That said Clark proposed to issue said bonds in substitution for those first mentioned, which were to be delivered up and cancelled, and the evidence shows that they were delivered to the said Clark at New York.

7th. That while Clark was in New York, making and delivering the bonds offered in this suit, the clerk of the district court

of Winnebago was acting as county judge in said county, and held a term of a county court, and issued county warrants, and did other business in discharge of his duties as acting county judge. Thereupon the court finds the law to be for the defendant; to which ruling the plaintiff then and there excepted and filed his bill of exceptions.

It is therefore considered and adjudged by the court that the defendant have and recover of and from the plaintiff the costs in this behalf laid out and expended, taxed at $ *an* and that execution issue therefor.

Be it further remembered that thereupon the court upon said finding of facts finds the issues as a matter of law to be with def't; to which finding and ruling pl'ff at the time and place excepted, and filed a motion for new trial, as follows:

(Here insert.)

And thereupon said motion, having been submitted to the court, was overrulled; to which ruling and order the pl'ff at the time excepted. And thereupon the court rendered judgement in favor of def't for costs; to which ruling and judgment the pl'ff at the time excepted. And to the end that the matters and things herein set forth may fully appear of record, the pl'ff brings this bill of exceptions, which he prays may be signed and sealed, and entered of record in the case, which is done.

SAM. F. MILLER. [SEAL.)

(Endorsed:) Filed May 18, 1869. Geo. B. Corkhill, cl'k.

POINTS AND AUTHORITIES.

I.

1st. The bonds sued on are negotiable instruments.

2d. The plaintiff is an innocent holder for value.

The Court below found on this point, as follows:

"The plaintiff owns the bonds, having received them of his father, by will. And the father purchased them, for value, with out notice of any defence to them, before maturity."

3d. The county of Winnebago, at the date of these bonds, i. e. March 9, 1860, had the power, under the laws of Iowa, to issue bonds to aid in the erection of a Court House.

The county had authority "to provide for the erection and rep-

aration of Court Houses, Jails and other necessary buildings within and for the use of the county,"

Section 129, *page* 26, *Code of Iowa, of* 1851.

When these bonds were issued the County Judge had the power to contract for the erection of a Court House, without submitting the question to a vote of the people, and thereby create an indebtedness against the county.

State of Iowa, ex rel. Brooks v. Napier Co. Judge, 7 *Iowa* 430.

By *Section* 114, *page* 23 *of Code*, it is enacted that: "The County Judge may submit to the people of his county, at any regular election or at a special one called for that purpose, the question whether money may be borrowed to aid in the erection of public buildings, &c."

4th. The power to borrow money for the erection of Court Houses and other public buildings being thus conferred upon the county, all the usual and necessary incidents to the full execution of the power, will be presumed to have been also conferred.

An incident necessary to the execution of the power, is the right to execute negotiable bonds, as by universal custom, these are the instruments properly issued by corporations as evidences of indebtedness.

Commonwealth ex rel. Reinboth v. Councils of Pittsburg, 41, *Penna*, 278.

Seybert v. city of Pittsburg, 1 *Wallace*, 272.

Meyer v. city of Muscatine, 1 *Wallace*, 391.

Hull & Argalls v. Marshall County, 12 *Iowa*, 156.

5th. When these bonds were issued, i. e. in 1860, the affairs of the several counties of Iowa were controlled and managed by the County Judges.

By the Statute of Iowa, see chapter 15, page 21, of Code of Iowa.

The County Judge is declared to be "the accounting officer and general agent of the county," with the power, among other things, *"to superintend the fiscal concerns of the county and secure their management in the best manner."* Also, *"to submit to the people the question whether money may be borrowed to aid in the erection of public buildings, &c."*

He had the power, without a vote of the people, to contract

for the erection of Court Houses and other public buildings, and thereby fasten a heavy indebtedness upon the people. He had the right and power to submit the question of borrowing money for such purposes, to the people. To announce the result of the election and provide the means for carrying into effect such vote, that is to issue bonds in the name of the county, and negotiate the same for the purpose of raising money. In other words the county acted through and by him. In these matters he was the county itself. The Supreme Court of Iowa, in case of *Clapp v. Cedar county*, 5 *Iowa* 55, declared him to be "the head and hand of the county."

In *Ring v. County of Johnson* 6 *Iowa* 272, it is held that "he is the living representative—the embodiment of the county. His acts are the acts of the corporation."

II.

From the foregoing authorities, it clearly appears that when the bonds in question were put upon the market for sale, a purchaser had the right to rely upon these points:

1st. That the County of Winnebago, through its County Judge, had the right to enter into a contract for the erection of a Court House, and to incur an indebtedness therefor, without submitting the question to a vote of the people.

2d. That the County of Winnebago had the right, upon submitting the question to a vote of the people, to borrow money for that purpose.

3d. That the County, when about to borrow money, had a right to issue negotiable bonds as evidence of indebtedness.

4th. That the County Judge was "the hand and head of the county," his acts being the acts of the county, and that he was the proper officer to execute bonds on behalf of the county.

It being established by reference to the statutes of Iowa, that the several counties composing that State, had the power to borrow money and issue bonds for that purpose "when authorized by a vote of the people," how shall the public know when bonds are offered for sale in the market, whether the condition precedent has been performed, i. e. whether a vote of the people has been taken.

1st. The fact that bonds have been issued by the county, au-

thorizes a purchaser to assume that the vote of the county has been taken, as required by law.

Commissioners of Knox county v. Aspinwall, 21 *Howard* 545.

2d. If the bonds recite that the vote has been taken, a purchaser is not bound to look further for evidence of a compliance with the conditions to the grant of the power.

Commissioners of Knox Co. vs. Aspinwall, 21 *Howard* 544.

Bissell vs. Jeffersonville, 24 *Howard* 287.

Moran vs. Miami county, 2 *Black* 722.

Gelpcke vs. City of Dubuque, 1 *Wallace* 203.

Meyer vs. City of Muscatine, 1 *Wallace* 385.

Thompson vs. Lee county, 3 *Wallace* 330.

The bonds in question recite, that "all of said bonds are issued in accordance with a vote of the people of said county, and in pursuance of an order of the county court of Winnebago county legally entered of record in the office of the county judge on the 9th day of March, A. D. 1860, in fulfillment of a contract entered into with said Martin Bumgardner for the erection of a court-house for said county of Winnebago."

"And the people of said county have voted the levying of sufficient taxes from year to year to pay the principal and interest of each and all of said bonds as the same mature and become payable."

If the facts stated in the above recitals, are true, then the bonds were legally issued and the county is bound thereby. In favor of an innocent purchaser for value, these recitals are taken to be true and cannot be gainsaid by defendant.

Upon the trial of the cause in the circuit court, pl'ff introduced in evidence the bonds declaired on, and also testimony showing that the father of pl'ff had bought the bonds before maturity for a valuable consideration, without notice of any defense thereto, and upon his death had bequeathed them to pl'ff.

Thereupon def't "offered testimony tending to show that no proposition was ever submitted to the people of Winnebago county, Iowa, for the borrowing of money to aid in the erection of a court house, or for the erection of a court house therein.

"That the only proposition submitted to a vote of the people of the county, was, whether a tax should be levied from year to

year, not exceeding ten years at farthest, the proceeds to be used in paying for a court-house. That Robert Clark, the county judge of Winnebago county, Iowa, entered into a contract with M. Bumgardner for the erection of a court house for the sum of $20,000, and that the county judge issued bonds to that amount and delivered them to the contractor as payment in advance therefore, and with him went to the city of New York for the purpose of negotiating and selling the same. That while in New York, and about the 23d of March 1860, the said Robert Clark, finding that the original bonds could not be negotiated, had forty other bonds each for the sum of $500.00, printed, signed the same, purchased a seal and attached the same to the bonds, and delivered the same to Bumgardner, and the same were sold to pl'ff's father for $10,000 stock of the New York Central R. R ; that the old bonds were delivered up to Robert Clark, and cancelled ; that the seal obtained in New York was brought back to Winnebago county, and was by Bumgardner sold to the county for $4.00 and has ever since been used as the seal of said county ; that during Clark's absence in New York, the clerk of the district court acted as county judge, and held the April term of the county court, and that one warrant was issued by such clerk, acting as county judge, during Clark's absense in New York, and that he transacted other business."

See bill of exceptions, page 36 of transcript.

Plaintiff objected to the introduction of this evidence, and to each and every part thereof, for the reasons :

1st. That the same was irrelevant and immaterial to the issues, and did not tend to show any facts constituting a defense to pl'ff action.

2d. That the evidence offered tended to contradict the recitals of the bonds, and that def't was estopped from so doing.

3d. That the testimony offered only tended to show irregularities in the manner of the execution of the bonds, and did not touch the question of the power to issue the same, and irregularities in the execution of the bonds could not be shown to defeat plaintiff's action, he being an innocent holder.

These objections were overruled and the evidence was admitted. Plaintiff excepted and assigns this ruling as error.

1. The plaintiff having proved that he was an innocent hold-

er for value of the bonds, and the defendant not proposing to show the contrary, we claim that it was error for the Court to admit evidence tending to contradict the recitals of the bonds.

Bissell v. Jeffersonville, 24 *Howard* 287.
Moran vs. Miami county, 2 *Black* 722.
Knox Co. vs. Aspinwall, 21 *Howard* 544.
Gelpcke vs. City of Dubuque, 1 *Wallace* 203.
Meyer vs. Muscatine, 1 *Wallace* 385.

2. So far as the evidence offered by defendant tended to show *irregularities* in the issuing of the bonds, on the part of the county officials it was clearly open to the objection urged, that such irregualarities could not defeat the action of plaintiff, he being an innocent holder for value.

Gelpcke vs. City of Dubuque, 1 *Wallace* 203.

IV.

1. The next error we assign, is: The rendering judgment in favor of defendant upon the facts as found by the Court.

As already shown when these bonds were issued and put upon the market, the County of Winnebago had the right, through its County Judge, to enter into a contract for the erection of a Court House, and incur an indebtedness therefor. That it had the right, upon submittting the question to a vote of the people, to borrow money for that purpose. That when about to borrow money, it had a right to issue negotiable bonds.

That the County Judge was "the hand and head of the county," his acts being the acts of the county. That he was the proper officer to execute bonds and issue the same on behalf of the county.

The evidence shows that plaintiff was the *bona fide* owner for value of certain bonds issued in the name of defendant, properly executed by Robert Clark, County Judge, dated March 9, 1860, and which recited that they had been issued in accordance with a vote of the people, in pursuance of a contract entered into by the County Judge for the erection of a Court House.

The recitals of the bonds justified plaintiff in purchasing the same. And the facts found by the Court would not defeat his action thereon, because the finding of facts shows that plaintiff was an innocent holder for value. As there was nothing upon

the face of the bonds to put a purchaser upon inquiry, and as it expressly appeared from the recitals of the bonds, read in connection with the statutes of Iowa, that the county of Winnebago had authority to issue the bonds, the plaintiff's rights must be determined by reference to these, and the bonds cannot now be invalidated, by showing that the County Judge had acted improperly or had been guilty of fraud in the issuing of the bonds.

In other words, the facts as found by the circuit court, do not as against an innocent holder, constitute a defense to an action upon said bonds.

If the recitals of the bonds are true, then the bonds are valid and binding upon the def't, because as we have already shown, the county could issue negotiable bonds for the purpose of borrowing money to aid in the erection of a court house, providing the people had so voted. From the recital of the bonds it appears that such vote had been taken. If this be true, then the bonds were legally issued and payment thereof cannot be defeated by def't.

V.

Def't seeks to defeat a recovery, by showing that the recital of facts in the bonds are untrue. Def't is estopped from so doing.

2d. Def't claims however that these bonds are not the bonds of Winnebago county, because they were executed in New York city and sealed with a seal there purchased by the county judge.

Suppose the County of Winnebago had by a proper vote duly taken, authorized the county judge to borrow $20,000 to erect a court house. That the county judge had duly prepared bonds similar in form to those sued on, and not being able to raise money thereon in Winnebago county, had brought the same to New York and sold them in the open market and used the proceeds in the erection of a court house, could the county defeat an action on the bonds, upon the plea that the bonds were *delivered* in New York? Clearly not. Yet the bonds were not binding obligations upon the county until thus sold and delivered in New York.

If a county authorized its county judge to borrow money for the erection of public buildings, is he limited to borrowing money within the county? Can he not go to any of the large

cities which are the money centers of the country, and there dispose of the bonds to the best advantage?

There can be no doubt that the county of Winnebago, if it becomes necessary to borrow money to aid in the erection of county buildings, has the right to borrow the sum needed in Chicago, New York, or any other place where the most favorable loan can be contracted. Having this right the county must possess the further right to send an agent to negotiate the loan, and such agent would clearly have the right to contract for a loan, wherever he could make a contract upon favorable terms. If the county possesses the right to make a contract for a loan beyond its territorial limits, does it not possess the right to execute the written evidence of the contract?

In other words, if the county judge as "the head and hand of the county" should be authorized to borrow money for the county and should in discharge of his duty, visit New York, and there contract for a loan of the money and receive the same for the county, could he not at once execute a contract binding the county to repay the amount? Would it be a defense to a suit upon such a contract, to show that the signatures of the county judge, and the seal of the county had been attached to the contract at a place beyond the territorial limits of the county.?

3. It is further objected that the bonds were not sealed with the county seal of Winnebago county.

We reply thereto:

1st. That the lack of the county seal does not vitiate the county bonds. The statutes of Iowa do not require that the negotiable paper of the county should be issued under the seal of the county.

In the case of *Ring vs. the county of Johnson*, 6 *Iowa* 271, decided in 1858, the Supreme Court of Iowa, expressly hold that the seal of the county is not essential to the validity of promissory notes, coupons and other contracts of like nature.

2d. That it does not appear as a matter of fact, that the bonds are not duly sealed.

Section 94, Code of 1851, of Iowa, authorized the County Judge to obtain *as soon as practicable*, a new seal for his county, bearing on it the words, Seal of the county of———, Iowa.

The evidence does not show that Winnebago county ever had any seal before March, 1860, or that it ever had any other seal than the very one attached to these bonds.

All the evidence shows, is that the County Judge, when in New York, procured a seal, had the same properly engraved, used the same in the execution of these bonds, and that the same is now and has ever since been used as the seal of the county.

VI.

The bonds in suit were offered for sale in New York in April, 1860. When thus offered for sale in the usual manner, what enquiry was it incumbent upon a purchaser to make, before he could safely purchase the same?

The first enquiry would be, "Has the county of Winnebago, through the County Judge, a right, under any circumstances to issue negotiable bonds to aid in the erection of a Court House?"

The Supreme Court of Iowa, construing the statutes of that State, answers "Yes. The County Judge, if authorized by a vote of the people, has a right to borrow money for that purpose, and to issue negotiable bonds upon which to obtain the money."

The next enquiry would be "How is the purchaser to know whether the people of the county have so voted?"

The Supreme Court of the United States answers:

"If the bonds recite that they are issued in accordance with a vote of the people, that is evidence that such vote has been taken, and a purchaser is justified in relying upon the verity of the recital.

The next enquiry would be, "Who has authority to issue and sign bonds on behalf of Winnebago county?"

The answer could only be, "The County Judge."

The next enquiry would be, "Who was County Judge of Winnebago county on the 9th day of March, 1860, when these bonds purport to have been issued?"

The answer could only be, "Robert Clark."

The next enquiry would be, "Did Robert Clark sign the bonds in question?"

But one answer could be given: "Yes. He did,"

Relying upon these well-established rules, the plaintiff buys the bonds, pays value for them, and at their maturity, demands payment thereof, and is met with an answer setting up irregularities in the execution of the bonds on the part of the county.

The facts set forth in the finding of the Court below, do not constitute a defense to the action of plaintiff, he being an innocent holder for value. Hence it was clearly error in the Court below, to render judgment for defendant.

We ask that the judgment of the Circuit Court be reversed, and the cause be remanded, with instructions to the Court below, to enter judgment in favor of plaintiff upon the facts as found.

SHIRAS, VAN DUZEE & HENDERSON,
COOLEY & EIGHMEY,
W. PENN CLARK,
Attorneys for Plaintiff in Error.

IN THE SUPREME COURT OF THE U. S.

DECEMBER TERM, 1871.

CHARLES R. LYNDE,
plaintiff in Error,

v.

THE COUNTY OF WINNEBAGO, STATE OF IOWA,
defendant in Error.

STATEMENT, BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR.

DES MOINES, IOWA:
CARTER, HUSSEY & CURL, PRINTERS.
1872.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

CHARLES R. LYNDE,
Plaintiff in Error,
v.
THE COUNTY OF WINNEBAGO, STATE OF IOWA,
Defendant in Error.
No. 178.

STATEMENT, BRIEF AND ARGUMENT OF MR. WITHROW, FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

ACTION in the Circuit Court of the United States for the District of Iowa, upon bonds purporting to be executed by the county of Winnebago, bearing the name of Robert Clark, as county judge, and purporting to be ensealed with the seal of said county.

The bonds sued upon are a part of a series amounting to twenty thousand dollars, purporting to be executed on the 9th of March, 1860, payable with interest at the rate of ten per cent per annum, at the office of the American Exchange Bank in the city of New York; and they provide that a failure to pay the interest as it shall become due shall mature the entire debt, principal and interest.

The bonds recite that: "They are issued in accordance with a vote of the people of said county, and in pursuance of an order of the county court of said county, legally entered in the office of the county judge on the 9th of March, 1860, in fulfillment of a contract entered into with one Bumgardner, for the erection of a court house for said county of Winnebago, and that the people of said county have voted the levying of sufficient taxes from year to year, to pay the principal and interest on said bonds as the same are matured and become due."

The defendant answered denying generally each and every allegation set out in the petition, and especially, that said bonds were made, executed and delivered by said county; that the same were issued in accordance with a vote of the people of said county; that any proposition to borrow money or issue bonds for any such purpose was ever submitted to or voted upon by the people of said county, and alleging that the said bonds were fraudulently issued by one Robert Clark, pretending to act as county judge; that when they were executed by said Clark he was in the State of New York, and was not county judge of said county; that at the time of issuance of said bonds the county clerk of said county was legally acting as county judge thereof; that the county never received any consideration therefor; that when the plaintiff purchased said bonds, the records of said county of Winnebago did not show that any proposition to borrow money or issue bonds had ever been submitted to the people of said county as required by law and recited in said bonds.

The case was tried by the court without a jury. A finding of the facts was made by the court upon which judgment was rendered for the defendant.

These findings will be found upon pages 33 and 34 of the record.

Upon the finding and upon the exceptions taken during the progress of the trial, set out on page 35, appellant assigns errors in this court.

BRIEF.

We present to the court the following points and authorities:

I.

The execution of the bonds in suit, without authority conferred by a vote of the people, was not merely an irregular exercise of existing authority—it was an act without power, and the bonds were therefore void.

Hull & Argalls v. *The County of Marshall*, 12 Iowa, 142.
Casady v. *Woodbury County*, 13 Id. 113.
The State of Iowa ex rel Brooks v. *Napier, County Judge*, 7 Iowa, 425.
Rev. of 1860, § 241.
Rev. Stat. 1843, chap. 31, § 4, p. 123, §§ 10 and 23; chap. 149, §§ 2 and 4.

II.

The execution of the bonds being without authority, the county is not estopped by the recital therein contained. An agent cannot create a power in himself to execute an instrument for his principal by reciting its existence. The absence of power is a sufficient defense, even against a holder without actual notice.

Code of 1851, § 114; Rev. 1860, § 250.
Code of 1851, § 115; Rev. 1860, 251.
Code of 1851, § 116; Rev. 1860, § 252.
Code of 1851, § 119; Rev. 1860, § 255.
Marsh v. *Fulton County*, 10 Wallace, 676.
Treadwell v. *The Commissioners*, 11 Ohio S. 190.
Hopple v. *Brown Township*, 13 Id. 330.
Beckel v. *Union Township*, 15 Id. 438.
The City of Aurora v. *West*, 22 Ind. 88.

The City of St. Louis v. *Alexander*, 23 Mo. 483.
Starin v. *Genoa*, 23 N. Y. 439.
Marshall County v. *Cook*, 38 Ill. 44.

III.

The bonds in suit were executed by Robert Clark, pretending to act as county judge, in the city of New York, while the clerk of the county was legally acting as county judge and holding the county court within the county. He could not act as a county judge, or as a county court of Winnebago county, while he was in New York, and therefore the bonds were not executed by the county judge or the county court.

Code of 1851, § 111; Rev. 1860, § 247.
Code of 1851, §§ 103, 107, a portion of which is reprinted in the Rev. of 1860, §§ 240, 244.
Code of 1851, § 94; Rev. of 1860. § 222.
Code of 1851, § 125; Rev. of 1860, § 261.
Burrill's Law Dict. word "Court."

IV.

The seal of the county was essential to the validity of the bonds of the county. The seal affixed was not the seal of the county, and the bonds were for that reason void.

Code of 1851, §§ 93 and 94; Rev. 1860, §§ 221 and 222.
Code of 1851, § 108; Rev. 1860, § 244.
Code of 1851, § 152; Rev. 1860, § 360.
Code of 1851, § 974; Rev. 1860, § 1823.
Bouv. Law Dict. (12th ed.) word "Bond."
7 Bac. Ab. word, "Obligation" "B." and "C."
Saylor et al. v. *Glaser*, 2 S. & R. 503.
Ring v. *Johnson County*, 6 Iowa, 271.
Web. Dict. word "Formally."
Bouv. Dict. word "Formality."

In the following argument we have elaborated these points, have made extracts from the autorities cited, and have reviewed the authorities cited by the counsel for the plaintiff in error.

ARGUMENT.

Four questions are presented by this record:

First. Was the execution of the bonds in suit an act without authority, or only an act in the irregular exercise of authority?

Second. Is the defendant, the county, estopped by the recitals in the bonds from denying the *existence* of the authority?

Third. Conceding the existence of the authority in the county judge, was Robert Clark county judge when he issued the bonds?

Fourth. Was the county seal essential to the validity of the bonds; and if essential, did these bonds bear the impression of such seal?

I.

The first question involves the construction of the statutes of the State prescribing the powers of an officer of a municipal corporation, created by the State. An uninterrupted current of decisions of the State courts giving a uniform construction to these statutes is binding upon this court. The first decision made by the Supreme Court of the State of Iowa, construing the statutes to which we have called the

attention of the court, was made in *Hull & Argalls* v. *The County of Marshall*.[1] In that case, the Supreme Court held:

That the county judge had no power to issue bonds of the county, in a negotiable form, without authority confirmed by a vote of the people; and bonds issued without such authority are void.

This ruling was followed by the same court in *Casady* v. *Woodbury County*,[2] and is the settled law of the State to-day. These cases do not conflict with *State of Iowa, ex rel. Brooks* v. *Napier, County Judge*.[3] The question as to the power of the county judge to borrow money or execute negotiable paper was not presented, discussed or decided in that case. The question raised was as to the power of the judge to contract for the erection of a court house. The contract out of which the case arose did not provide for the borrowing of money or the issuance of negotiable bonds. The court held that the judge had power to bind the county for the erection of public buildings. The opinion of the court is founded upon section 105, Code of 1851,[4] as follows:

The county judge is hereby invested with the usual powers and jurisdiction of County Commissioners and of a judge of probate, and with such other powers and jurisdiction as are conferred by this statute.

The county commissioners were authorized:

"To provide for the erecting and repairing of court houses, jails, and other necessary public buildings."

The same statute[5] authorized the commissioners:

"To examine, allow and settle all accounts of the receipts and expenditures of money of the county. To have the care of the county property, and the management of the county funds and business, except in cases otherwise provided for; and they shall have no other powers except such as are or may be given by law."

1. 12 Iowa, 142.
2. 13 Iowa, 113.
3. 7. Iowa, 425.
4. Sec. 941 Rev. of 1860.
5. Rev. Stat. 1843, chap. 31, section 4, clause 4, p. 123.

The act prescribes but one method of paying claims against the county—the auditing of the same by the board, the execution of an order by the clerk of the board, directing the payment of the same by the treasurer, and the payment by the treasurer, in the order of their presentation, from the funds of the county.[6] The county commissioners were authorized to provide for the construction of a court house, but claims against the county for such work were required to be presented to the board, and allowed and paid from current revenues, upon orders drawn by the clerk as other claims were authorized to be drawn and paid. No authority whatever was conferred upon the board to borrow money, and none to bind the county by negotiable bonds. No such power was conferred upon the county judge, with the usual "powers and jurisdiction of the county commissioners."

When the Code of 1851 superseded the Revised Statutes of 1843, provision was made for "borrowing money" to "aid in the erection of public buildings." Prior to 1851 no power existed to borrow money for such purpose. Said the Supreme Court in *The State ex rel. Brooks* v. *Napier:*

"Provision is made by the Code for the submission of certain questions to a vote of the people of the county. *These relate, however, to matters in which the county judge has no power without a vote of the people, and in which the object in submitting the question to them is, that their vote may confer a power which he did not before possess.* These questions are: 1. Whether money may be borrowed by the county to aid in the erection of public buildings, etc.

In *Hull & Argalls* v. *The County of Marshall*, the court thus states its conclusions as to the question:

From the partial analysis of the statute defining the powers of a county judge over the subject of court houses we deduce the following propositions: *First.* That among others the duty of providing a court house is specifically enumerated and enjoined. *Second.* That the performance of this duty involves the power to enter into all necessary and lawful contracts.

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6. Rev. Stat. 1843, chap. 31, §§ 10, 23; chap. 149. §§ 2 and 4.

Third That the terms of said contracts so far as they relate to the payment of the expenses incident to the undertaking, must be in accordance with, and subject to the provisions of the statute regulating the disbursement of the county funds. *Fourth.* That the costs and charges of erecting a court house can only be paid in one of two ways, either out of the ordinary revenue of the county, or by a loan of money; that under the first of these methods the payment must be made alone upon the county judge's warrants, issued in the particular manner prescribed by law, for subsisting claims duly audited and allowed. The second method contemplates a cash payment, out of a fund borrowed for that purpose, which, when authorized, furnishes the only occasion when a county judge can bind the county by negotiable securities. *Fifth.* That the county treasurer has the legal right to pay out the funds of the county in liquidation of county bonds only when they have been given for money borrowed, and a special fund appropriated for that purpose. *Sixth.* In the absence of either of these contingencies, the authority to issue bonds in the form of negotiable paper, binding the county for the future payment of money is wanting, and if exercised would be a void act.

* * * * * * * * * * *

It only remains for us to state that according to our apprehension, there is no conflict between the opinions above expressed and the ruling made in *The State of Iowa ex rel Brooks* v. *Napier*.

The Supreme Court of Iowa has never held that the county judge had the power to execute, without authority of a vote of the people, the negotiable bonds of the county, drawing a higher rate of interest than that prescribed by law and payable at a future day, as evidence of indebtedness for money borrowed. We have shown that *The State ex rel Brooks* v. *Napier* not only declared no such construction of the statute, but did announce that the "county judge has no power without a vote of the people," and that the object of such "vote is to confer a power which he did not before possess." In *Clapp* v. *Cedar County*[7] a vote was had by the people upon the proposition to issue bonds, and the county sought to defend upon the ground that the proposition was *irregularly* submitted--in this the court finds "that no proposition was ever submitted to said voters to borrow money or to issue bonds for that or any

7. 5. Iowa, 54.

other purpose." The difference is between the exercise of a power irregularly conferred, and the exercise of a power which had never been conferred in any manner. The question as to the the power of the county judge to act without a vote of the people is not raised in *Ring* v. *Johnson County*.[8] Every express ruling upon the question has been against the existence of the power. Neither the plaintiff in error nor his testator purchased these bonds relying upon a construction of the statutes made by the Supreme Court of the State. In this the case is materially different from *Gelpcke* v. *The City of Dubuque*[9] and the cases following it. This court cannot in this case elect between the first and last rulings of the Iowa court to protect *bona fide* holders—it must follow all of the Iowa decisions or disregard all.

II.

The counsel for the plaintiff in error, next maintains:

It being established by reference to the statutes of Iowa, that the several counties composing that State had power to borrow money and issue bonds for that purpose "when authorized by a vote of the people"—

1st. The fact that bonds have been issued by the county, authorized a purchaser to assume that the vote of the county has been taken as required by law.

2d. If the bonds recite that the vote has been taken, a purchaser is not bound to look further for evidence of a compliance with the conditions of the grant of the power."

I believe a concise and quite fair statement of the proposition is: If the county judge of a county may be authorized to borrow money and issue bonds, and has executed a bond reciting that the power has been conferred, the existence of the bond and the recital are conclusive evidence of the grant.

Is this position tenable in this case? The statute provided:[10]

8. 6 Iowa, 272.
9. 1 Wall. 303.
10. Code of 1851, § 114, Rev. 1860. § 250.

The County Judge may submit to the people of his county at any regular election, or at a special one called for that purpose, the question whether money may be be borrowed to aid in the erection of public buildings.

The whole question, inclusive of the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, was required to be published."

When the question involved the borrowing or the expenditure of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof, in addition to the usual taxes."

We now ask the attention of the court to the entire section relating to the result of the election:"

The County Judge on being satisfied that the above requirements have been substantially complied with, and that a majority of the votes cast are in favor of the proposition submitted, *shall cause* THE PROPOSITION AND RESULT OF THE VOTE to be entered at large on the minute book, and a notice of its adoption to be published for the same time and in the same manner as is above provided for publishing the preliminary notice; AND FROM THE TIME OF ENTERING THE RESULT OF THE VOTE IN RELATION TO BORROWING OR EXPENDING MONEY, * * * * * * * * * * * THE VOTE AND THE ENTRY THEREOF ON THE COUNTY RECORDS SHALL HAVE THE FORCE AND EFFECT OF AN ACT OF THE GENERAL ASSEMBLY.

No discretion is vested in the county judge other than to pass upon the compliance with the requirements of the statute as to the submission of the proposition and the result of the election as to the adoption or rejection of the proposition. When he has adjudicated upon these matters that adjudication is conclusive upon the county in favor of those who acquire rights relying upon it, and without knowledge of facts which would impeach it for fraud. But the proposition upon which the people have voted must speak for itself. If it authorizes the county judge to do one thing, he cannot recite that it empowers him to do a very different thing, and conclude the county by the

11. Code of 1857, § 115; Rev. 1896, § 251.
12. Code 1857, § 116: Rev. 1860, § 252.
13. Code 1851, § 119: Rev. 1860, § 255.

recital. That proposition has "the force and effect of an act of the General Assembly," and parties dealing with the county judge have notice of it and must act upon that notice. Every purchaser of the bonds of a county knows that the authority of the agent who executes them is declared in the express terms in which it is granted upon the records of the county. He knows that the absence of such a record is the evidence of the non-existence of such authority. Did the Legislature intend to authorize a county judge to confer upon himself power by a mere recital, in a paper which is no part of the record which the statute provides shall declare his powers with the same force and effect as if the same had been declared by Legislative act?

Keeping in view that the power to issue these bonds was never in fact granted to the county judge, we glance at the cases cited by counsel in support of the proposition that the recital estops the county from denying the existence of the power:

The Commissioners of Knox County v. *Aspinwall*,[14] is the first case cited. The statute conferred upon the board of commissioners the power to subscribe for stock in a railroad company, but prescribed as a condition upon which it should be exercised that the subscription should be approved by a majority of the legal voters of the county. It was alleged that there was an omission to comply with the requisition of the law in respect to notices to be given of the election. The alleged defect was held a mere *irregularity* in the exercise of a power existing in the board, —and that the county was estopped from setting it up by the recital in the bond. The case goes to the point of holding that a recital is conclusive as to the regularity of the *exercise* of the power—not to the extent of holding that it is conclusive as to its *existence*. Said Mr. Justice NELSON, in delivering the opinion of the court:

14 21 How, 539.

The act in pursuance of which the bonds were issued is a public statute of a State, and it is undoubtedly true that any person dealing in them is chargable with knowledge of it; and as this board was acting under delegated authority, he must show that the authority has been properly conferred. The court must therefore look into the statute for the purpose of determining the question; and upon looking into it we see that full power is conferred upon the board to subscribe for stock and issue the bonds, when a majority of the voters of the county have determined in favor of the subscription, after due notice of the time and place of the election.

Bissell v. *The City of Jeffersonville*,[15] presents substantially a like case, with the additional fact that the alleged irregularities were cured by subsequent curative legislation: Said Mr. Justice CLIFFORD:

Purchasers of such paper look at the form of the paper, *the law which authorized it to be issued, and the recorded proceedings on which it is based.*

Moran v. *The Commissioners of Miami County*,[16] is a like case. *Gelpcke* v. *The City of Dubuque*,[17] we presume is cited because of the following sentence in the opinion of Mr. Justice SWAYNE:

"When a corporation has power under any circumstances, to issue negotiable securities, the *bona fide* holder has the right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper."

We seek to impeach these bonds for want of power in the alleged agent of the county to execute them—and "other commercial paper may be impeached for the like infirmity."

Thompson v. *Lee County*,[18] relates solely to another question, and requires no further notice.

In this connection I must express the regret that *Marsh* v. *Fulton County*,[19] escaped the attention of the learned counsel for the plaintiff. In that case power was conferred

15. 24 How. 298.
16. 7 Black. 722.
17. 1 Wall. 206.
18. 3 Wall. 327.
19. 10 Wall. 676.

to issue bonds to one corporation, and was attempted to be exercised by issuing them to a new one constituted of a part of the old. It was held by this court that the power to issue the bonds never existed; that the "*innocent holder of the paper was bound to look to the action of the officers of the county, and ascertain whether the law had been so far followed by them as to justify the issue of the bonds;*" that the authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. Apply the rule recognized not only by the last case cited, but by those cited by the counsel for the plaintiff, to this case. Had the plaintiff looked at the law which it is claimed authorized these bonds to be issued, and the recorded proceedings of the county judge upon which they are based, had he ascertained whether the law had been so far followed as to justify the issuance of the bonds, he would have known the facts which the court below found. If in the cases cited it was clearly his duty to make these inquiries it was as unquestionably his duty under a statute which required the precise and entire proposition voted by the people to be spread upon the record, and which gave to it the force of an act of the General Assembly of the State."[19]

Even the recital upon which counsel rely so confidently made it the duty of the purchasers of these bonds to examine the record. It is expressly referred to: "an order of the county court of Winnebago county, legally entered of record in the office of the county judge, on the 9th day of March, 1860." An examination would have disclosed the fact that no such order existed; and that no such authority had been conferred by a vote of the people.

While a *bona fide* holder of commercial paper may presume the regular *exercise* of ostensible authority by the

19. See Treadwell *v.* The Commissioners, 11 Ohio S. 190; Hopple *v.* Brown Township, 13 Id. 330; Beckel *v.* Union Township, 22 Id. 438; The City of Aurora *v.* West, 22 Ind. 88; The City of St. Louis *v.* Alexander, 23 Mo. 483; Starin *v.* Genoa, 23 N. Y. 439; Marshall County *v.* Clark, 38 Ill. 44.

agent by whom it is executed, no agent is permitted to conclude his principal as to the existence of authority by his own declarations, inconsistent with his letter of attorney.

III.

The finding of the court shows that the bonds in suit were printed in New York; that one Robert Clark "had a seal made at New York, which he called the seal of the county, and then and there signed said bonds, and affixed said seal to them, and delivered them to said Bumgardner," that while he was in New York making and delivering these bonds, "the clerk of the court of Winnebago was acting as county judge in said county, and held a term of a county court, and issued county warrants, and did other business in discharge of his duties as acting county judge."

The statute of Iowa, provides:[20]

> In case of a vacancy in the office of county judge, and in the case of the absence, inability or interest of that officer, the prosecuting attorney of the county shall supply his place * * * * and when the prosecuting attorney cannot act the county clerk shall fill the place of the judge. * *

The office of prosecuting attorney was abolished by the constitution of 1857, leaving the clerk the only officer competent to supply the place of the county judge during his absence. The clerk discharged the duties, financial and judicial of the office during his absence. Did the county have two county judges at the same time, each one "the hand and head of the county," each having full and complete power to exercise the duties of the office? The county judge was required to keep his office open at all usual times; and he was made keeper of the county seal. He had the custody of all "books, papers and instruments pertaining to his office." He audited all claims against the county, and was required to draw and seal with the county seal all warrants on the treasurer for money to

20. Code 1851, § 111: Rev. 1880, § 247.

be paid out of the county treasury. He settled with the treasurer and other persons charged with the disbursement of moneys for the county. He kept an account with the treasurer. He was to keep a "minute book" in which "orders for the allowance of money from the county treasury" were to be made; a "road record" in which he was required to enter all orders in regard to roads; a probate record; a warrant record. It was his duty to institute and prosecute civil actions; superintend the fiscal concerns of the county; keep an account of receipts and expenditures &c. May Clark exercise these powers in New York, and the clerk in Winnebago county at the same time?[21] There can be but one office and that shall be at the county seat. The whole tenor of the statute indicates that the purpose of the Legislature was to have but one office for the transaction of business—but one place at which the records and the seal should be kept—but one place at which the records and the seal should be used. In this case the clerk used the seal in Winnebago county, for it was necessary to the execution of warrants; at the same time Robert Clark used "a seal which he called the county seal" in New York. It has been found in Iowa that but few counties however wealthy and populous, could afford the luxury of *one* county judge. Winnebago, with its twenty-nine electors, seems to have had two judges and two seals. Its increased facilities for doing a "smashing business" were not left unemployed — while one was at home holding court and issuing warrants with one seal, the other was in New York with the other seal issuing bonds, twenty thousand dollars in a lot, and superintending their exchange at fifty per cent of their par value for New York Central Railroad bonds at par.

But it is asked—may not the county of Winnebago bor-

21. Code 1851, §§ 103-107: a portion of these provisions are reprinted in the Rev. of 1860, §§ 240-244.

row money in New York, and may it not execute written evidence of its debt at the place where it is contracted? We answer—the county has but one seal and the statute contemplates and the common law requires that it shall be kept at the office of the county judge in the county, and that the ensealing of a bond can be done only where the county seal is kept. It may be competent for the county judge to deliver a bond beyond the jurisdiction of the county after it has been duly signed and sealed—this being an act which could be done by one not acting in the capacity of county judge. The bond could be signed only by Robert Clark when legally acting as county judge and sealed only with the county seal.

But it is claimed that these bonds were issued in the exercise of the power "to provide for the erection and reparation of court houses." This power is conferred upon the *county court*, sitting as a court; and not upon the county judge, acting as the *financial agent of the county*. We have elsewhere shown that the county judge is required to keep his office at the county seat, "open for business at all usual times."[22] He shall keep the county seal, which shall be the seal of the county court."[23] The "county court shall be considered in law as always open."[24] A court sits "at certain fixed times and places, attended by proper officers."[25] It consists of "the presence of a sufficient number of the members" of a body organized to administer justice, "regularly convened in an authorized place at an appointed time, engaged in the full and regular performance of its functions." The clerk was holding the county court at the place required by law, and in so doing, he exercised powers conferred by law. Was the "county court" in session in New York at the same time?

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22. Code of 1851, §104; Rev. 1860, § 240.
23. Id. and Code 1851, § 94; Rev. 1860, § 222.
24. Code 1851, § 135; Rev. 1860, § 261.
25. Burrill's Law Dict. word "Court."

IV.

Each county is required "to keep a seal such as provided by law."[26] The device of the seal is prescribed, and it is made the seal of the County Court.[27] It is further provided:[28]

Deeds for the conveyance of lands, and other contracts made by the county which are to be formally executed, shall be in the name of the county, executed by the county judge in his official capacity, and acknowledged by him and have the county seal affixed.

It is further made the duty of the county treasurer to "receive all moneys payable to the county, and to disburse the same on warrants drawn and signed by the county judge, and sealed with the county seal, and not otherwise."[29]

Among the regulations pertaining to trade is the following:[30]

The use of private seals in written contracts (except the seals of corporations) is hereby abolished, and the addition of a private seal to an instrument of writing hereafter made shall not affect its character in any respect.

Upon these statutes it is claimed by plaintiff's counsel, that the county seal was not essential to the validity of the bond sued on in this action. The cause of action is a bond, which at common law was a special contract, to the validity of which *a seal* was essential.[31]

The Supreme Court of Iowa, in *Ring* v. *Johnson County*,[32] in giving a construction to this statute, used this language:

"The words "to be formally executed" could not have been used to distin-

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26. Code of 1851, § 93; Rev. 1860, § 221.
27. Code of 1851, § 94; Rev. 1860, § 222.
28. Code of 1851, § 108; Rev. 1860, § 244.
29. Code of 1851, § 152; Rev. 1860, § 360.
30. Code of 1851, § 974; Rev. 1860, § 1823.
31. 11 Bouv. Law Dict. (12th ed.) word "Bond" p. 212; 7 Bac. Ab. word "Obligations" B. and C. ed. 1860, pp 241-3; Taylor *et al v.* Glaser, 2 S. & R. 503.
32. 6 Iowa, 271.

guish written from unwritten contracts, but they manifestly indicate some distinction between those which are written. It may be asked, what is there besides deeds of conveyance, to which the words "other contracts to be formally executed," can apply, unless they include all which are to be signed by one or both of the parties. We may answer that it would naturally and well apply to all that class of cases which the law formerly said should be under seal, etc., and which our statute now says shall be acknowledged and recorded —to title bonds, and all instruments creating an interest in or affecting real estate—perhaps to contracts coming within the statute of frauds, and the sales of personal property when the possession is not changed. These instances, we say, may be intended by those words, *because these the law requires to be in writing*, and generally requires an acknowledgement, and recording also, for some purpose, and in which the common law requires a seal. But it is not our design to undertake a definition of all the instances, which the words under examination are intended to embrace. We only aim to show that there may be a meaning for them, without extending them to all written instruments. They cannot apply to parol and implied contracts, and therefore they must indicate some line of distinction among written ones, and the above remarks indicate a possible and reasonable distinction. Upon the whole, we are of the opinion that the following propositions are correct: 1. The section under review of course does not apply to parol or implied contracts. 2. The term "contracts to be formally executed" indicate a distinction among written contracts, and 3. The promissory note of the county is not embraced in the meaning of these terms. Therefore we conclude that the seal of the county is not essential to the validity of the instrument now sued on.

The instrument sued on was a coupon cut from a bond. Upon this authority the counsel for the plaintiff, in error relies, as supporting the proposition: "That the lack of the county seal does not vitiate the county bonds." The court will observe that while the Supreme Court of Iowa seemed to be uncertain as to the class of instruments to which the words "formally executed" relate, it is intimated that they were intended to refer to instruments which at common law were required to be in writing *and under seal*. Observance of certain "ceremonies," as they were termed at common law, was essential to the making of a good bond, and these were "writing on paper or parchment, sealing and delivery."[33] "Formally" signifies "according to established form, rule, order, rite or ceremony."[34]

33. 7 Bac. Ab. word "Obligation" C. Am. ed. 1860, p. 243.

34. Webster's Dict. word "Formally."

"Formality" signifies "the conditions which must be observed in making contracts, and the words which the law gives to be used in order to render them valid; it also signifies the conditions which the law requires to make regular proceedings."[35]

That an instrument which could be executed at common law only by affixing a seal belongs to the class of instruments to be "formally executed" is reasonably clear. Another section of the same statute absolutely prohibited the disbursement of any of the money of the county except upon the warrant of the county judge bearing the county seal. A warrant is a mere order by the auditing officer directing the payment of moneys in satisfaction of allowed claims against the county. It will not be lightly presumed when the use of the seal was invariably required in the execution of a warrant, that the Legislature intended to dispense with it when the same officer was executing the bond of the county—an instrument of a higher character, undertaking to pay money at a future day certain, with interest at a higher rate than that allowed upon the ordinary indebtedness of the county, and securing to the holder the right to insist upon the levy of a special tax from year to year and the exclusive appropriation of the proceeds arising therefrom to the payment of principal and interest of his bond.

Our construction of the statute is also supported by the section abolishing the use of *private* seals, excepting therefrom expressly the seals of corporations; and providing that the addition of a *private* seal to a paper shall "not effect its character in any respect." If it was intended to render unnecessary the use of the seal of a public or municipal corporation in the execution of instruments, to which it was, at common law, necessary to affix the corporate seal, the use of the word "private" was exceedingly

35. Bouv. Law Dict. word "Formality."

unfortunate. In some quarters it has been doubted if the statute abolishes as to contracts by public corporations, the distinction between contracts by specialty and simple contracts, further than to make every instrument in writing *prima facie evidence* of a valid consideration.

It is also claimed that the record does not show that the bonds were not duly sealed. This is founded on the section of the statute requiring the county judge of any county *then* having a seal to "obtain a new one of the same size with the present one," etc.[36] By the same statute it was provided that the seals of the board of commissioners and of the probate court should "remain until the new seal is obtained." The law never contemplated the transaction of county business without a seal, and absolutely prohibited the payment of any money from the county treasury except upon warrants sealed with the county seal. This statute was passed twenty years before these bonds were issued. To show that the county had a seal before March 1860, or that it ever had any other seal than the very one attached to these bonds, seemed unnecessary in view of the proof which the court found was made that while Clark was in New York, making and delivering the bonds offered in this suit, the clerk of the district Court of Winnebago county was acting as county judge of said county, and held a term of a county court, and issued county warrants, and did other business in discharge of his duties as acting county judge. He could issue no county warrants without using the county seal.

THO. F. WITHROW,
for the defendant in error.

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36. Code of 1857, § 94: Rev. 1860, § 222.